



ARIZONA DEPARTMENT OF HEALTH SERVICES

July 2, 2020

Mountainside Fitness Acquisitions, LLC
d/b/a Mountainside Fitness
c/o
Acting Manager or Employee
at Recipient Facility

**RE: DEMAND FOR COMPLIANCE WITH EXECUTIVE ORDER 2020-43 AND
EMERGENCY MEASURES PRESCRIBED BY THE DIRECTOR OF THE ARIZONA
DEPARTMENT OF HEALTH AND TO CEASE AND DESIST FROM ENGAGING IN
ACTIVITY THAT UNREASONABLY THREATENS PUBLIC HEALTH AND WELFARE**

On June 29, 2020, the Governor of the State of Arizona issued Executive Order 2020-43 (the "Executive Order"), pursuant to which indoor gyms and fitness clubs or centers were required to close effective at 8:00 p.m. on Monday June 29, 2020, and remain closed until at least July 27, 2020.

Pursuant to her authority, including A.R.S. §§ 36-136 and 36-787, and because of the existence of a serious threat to public health and welfare, Dr. Cara Christ, M.D. (the "Director") of the Arizona Department of Health Services (the "Department") prescribed emergency measures for preventing and controlling COVID-19 by requiring that indoor gyms and fitness clubs or centers close and remain closed until at least July 27, 2020 (the "Emergency Measures").

By continuing to operate, Mountainside is in violation of the Executive Order and the Emergency Measures. The purpose of this correspondence is to (1) explain to Mountainside why it must abide by the Executive Order and the Emergency Measures, and (2) give Mountainside one final opportunity to comply, and do your part to protect Arizona, before we seek injunctive and declaratory relief against you.

If Mountainside does not provide written assurances to us on or before noon on July 3, 2020, that it will abide by the Executive Order and the Emergency Measures, then the Department will file a civil action against Mountainside seeking a temporary restraining order, preliminary and injunctive relief, and declaratory relief as soon as possible, but in no event later than the next business day.

**I. WE ARE IN THE MIDST OF A PANDEMIC AND WE ALL MUST DO OUR PART,
NO MATTER HOW TOUGH, TO PROTECT EACH OTHER AND STOP THE SPREAD
OF COVID-19**

Douglas A. Ducey | Governor Cara M. Christ, MD, MS | Director

As you know, Arizona is combating a pandemic due to the spread of COVID-19, a communicable disease that can cause severe illness and even death. COVID-19 is thought to spread from person to person, mainly through respiratory droplets produced when an infected person coughs, sneezes, talks, or even breathes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another. COVID-19 seems to be spreading easily and sustainably in the community--what is termed as "Community Spread"--in many affected geographic areas, including Arizona. Community Spread means people have been infected with the virus in an area, including some who are not sure how or where they became infected.

The Department understands that intense physical exercise in densely populated sports facilities could increase the risk of respiratory infection. Therefore, vigorous exercise in confined spaces should be minimized during outbreaks like the COVID-19 pandemic. Indeed, in the context of a gym or fitness facility, we know from the study of influenza and tuberculosis that the risk of airborne infection increases during periods of peak occupancy, where occupancy and CO2 levels were high. This suggests that inefficient ventilation in gyms is a significant problem, with high CO2 concentrations resulting in impaired air quality and high health risks to users, including increased risk of airborne infections like COVID-19.

On March 30, 2020, the Director, based on an epidemiological assessment of Arizona-specific data and in alignment with the Centers for Disease Control and Prevention guidance, recommended the State implement enhanced mitigation strategies, which are ongoing. As of July 2, 2020, there have been at least 84,092 diagnosed cases of COVID-19 in Arizona, including 1,720 deaths. The number of cases and hospitalization of COVID-19 continues to increase. Indeed, data shows that Community Spread continues to grow at an exponential pace and is greatest among the demographic of 20-44 year olds--*the very demographic of those who patronize establishments like your own.*

II. THE DIRECTOR IS EMPOWERED TO ENACT EMERGENCY MEASURES TO PROTECT PUBLIC HEALTH AND WELFARE

Based on the foregoing, the Director reasonably believes that gyms should close and remain closed until at least July 27, 2020, because should indoor gyms and fitness centers or clubs remain open during that time, they will pose a serious threat to public health and welfare by exacerbating the spread of COVID-19, facilitating Community Spread, and therefore placing the public at significant risk. Arizona law empowers the Director to effectuate her Decision.

"The Department, in addition to other powers and duties vested in it by law, shall ... [p]rotect the health of the people of the state" and "[e]ncourage and aid in coordinating local programs concerning control of preventable diseases in accordance with statewide plans that

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shall be formulated by the department.” A.R.S. § 36-132(A)(1), (7). The Director is in charge of implementing the Department’s charge, policies, and mission.

Moreover, the law mandates that:

A. The director shall:

2. Perform all duties *necessary to carry out the functions and responsibilities of the department.*

4. *Administer and enforce the laws relating to health and sanitation and the rules of the department.*

6. *Exercise general supervision over all matters relating to sanitation and health throughout this state.* When in the opinion of the director it is necessary or advisable, a sanitary survey of the whole or of any part of this state shall be made. The director may enter, examine and survey any source and means of water supply, sewage disposal plant, sewerage system, prison, public or private place of detention, asylum, hospital, school, public building, private institution, factory, workshop, tenement, public washroom, public restroom, public toilet and toilet facility, public eating room and restaurant, dairy, milk plant or food manufacturing or processing plant, and any premises in which the director has reason to believe there exists a violation of any health law or rule of this state that the director has the duty to administer.

7. *Prepare sanitary and public health rules.*

8. Perform other duties prescribed by law.

G. The director may make and amend rules necessary for the proper administration and enforcement of the laws relating to the public health.

H. *Notwithstanding subsection I, paragraph 1 of this section, the director may define and prescribe emergency measures for detecting, reporting, preventing and controlling communicable or infectious diseases or conditions if the director has reasonable cause to believe that a serious threat to public health and welfare exists. Emergency measures are effective for no longer than eighteen months.*

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I. The director, by rule, shall:

1. ***Define and prescribe reasonably necessary measures for detecting, reporting, preventing and controlling communicable and preventable diseases.*** The rules shall declare certain diseases reportable. The rules shall prescribe measures, including isolation or quarantine, that are reasonably required to prevent the occurrence of, or to seek early detection and alleviation of, disability, insofar as possible, from communicable or preventable diseases. The rules shall include reasonably necessary measures to control animal diseases transmittable to humans.

J. ***The rules adopted under the authority conferred by this section shall be observed throughout the state and shall be enforced by each local board of health or public health services district,*** but this section does not limit the right of any local board of health or county board of supervisors to adopt ordinances and rules as authorized by law within its jurisdiction, provided that the ordinances and rules do not conflict with state law and are equal to or more restrictive than the rules of the director.

A.R.S. § 36-136 (emphasis added).

In addition, in the case of a state of emergency--which Governor Ducey declared in connection with the COVID-19 pandemic--the Department "shall coordinate all matters pertaining to the public health emergency response of the state." A.R.S. § 36-787(A). This includes "[p]lanning and executing public health emergency assessment, mitigation, preparedness response and recovery for this state", "[c]oordinating public health emergency response among state, local and tribal authorities", "[c]oordinating recovery operations and mitigation initiatives subsequent to public health emergencies." A.R.S. § 36-787(A) (1), (2), (4).

In light of the facts set forth in Section I of this correspondence, pursuant to her authority, including §§ 36-136 and 36-787, and because of the existence of a serious threat to public health and welfare, the Director has prescribed the Emergency Measures to combat the spread of COVID-19 and protect the health and welfare of Arizonans. Moreover, pursuant to the authority granted him under Arizona law, the Governor issued the Executive Order. That said, the Executive Order is not necessary to implement or otherwise validate the Emergency Measures, because it stands on its own as a lawful exercise of her discretionary authority under Arizona law.

III. MOUNTAINSIDE MUST COMPLY WITH THE DIRECTOR'S DECISION

Mountainside's refusal to abide by the Executive Order and the Emergency Measures is unlawful. Worse, it risks the lives of thousands of Arizonans. This pandemic is tough on all of

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us, but we all must do our part to protect the public health and welfare no matter the cost. Indeed, this is the social contract by which we all must abide.

Again, if you do not provide written assurances to us on or before noon on July 3, 2020, then the Department will file a civil action against Mountainside seeking a temporary restraining order, preliminary and injunctive relief, and declaratory relief as soon as possible, but in no event later than the next business day

We trust that with reflection Mountainside will reach the only correct decision that will protect the public and abide by the Director's Decision.

If you desire to discuss this matter, please do not hesitate to contact our legal counsel Craig Morgan at Sherman and Howard, 602-240-3062.

Regards,

The Arizona Department of Health Services

cc:

Dr. Cara Christ, M.D.
The Office of Governor Douglas A. Ducey
Robert Lane, Esq.
Gregory Falls, Esq.

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